

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

MOBILE BAYKEEPER, Inc.,

Plaintiff,

vs.

ALABAMA POWER COMPANY,

Defendant.

Case No.: 1:22-CV-00382

NOTICE OF FILING OF EVIDENTIARY MATERIALS

Defendant Alabama Power Company, through undersigned counsel, hereby files Exhibit ZZ in support of its Motion to Dismiss. In the Complaint, Mobile Baykeeper asserts that its members “fear contamination of drinking water, wildlife, and river water, by ground and surface water contamination and by discharges and pollution from coal ash in groundwater, wetlands, and a creek in Alabama Power’s Plant Barry coal ash impoundment.” (Doc. 1-Compl. ¶ 12, PageID.4). In response to this allegation, Exhibit ZZ summarizes the arsenic levels independently reported to the Alabama Department of Environmental Management (“ADEM”) by community water systems in Mobile and Baldwin Counties from 2017 to present. The data included in Exhibit ZZ are extracted from the systems’ Consumer Confidence Reports, which are annual drinking water quality reports required to be submitted to ADEM. *See* ADEM Admin. Code r. 335-7-14. These

reports are judicially noticeable public documents on file with a state agency and are accessible through ADEM's online eFile system.¹

This Court may take judicial notice of documents at the motion to dismiss stage. *See* Fed. R. Evid. 201; *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (“[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.”); *McCone v. Thorpe*, 828 F. App'x 697, 698 (11th Cir. 2020) (“A district court may take judicial notice of public records without converting a motion to dismiss into a motion for summary judgment.”); *Douglas v. Bayview Loan Servicing, LLC*, No. CA 11-00495-KD-C, 2012 WL 345364, at *3 (S.D. Ala. Jan. 13, 2012) (Court “may consider ... documents whose contents are alleged in the complaint and whose authenticity is not questioned ... without converting the [12(b)(6)] motion to dismiss to a motion for summary judgment”) (internal quotations and citations omitted).

Specifically, this Court may take judicial notice of publicly available records on file with a state agency, such as ADEM. *See United States v. Howard*, 28 F.4th 180, 186 n.2 (11th Cir.) (“Bramwell was a physician at the time of the events in this case, but after she was convicted and sentenced, she surrendered her medical license. That fact is not included in the record, but **we can take judicial notice of it as a publicly available state agency record.** *See Fla. Dep't of Health*, <https://mqainternet.doh.state.fl.us/MQASearchServices/HealthcareProviders/LicenseVerification>

¹ Each of the community water system's Consumer Confidence Reports is accessible through ADEM's publicly available eFile system, *available at* <http://app.adem.alabama.gov/eFile/>. To locate a system's Consumer Confidence Reports, select “water” as the “Media Area,” include the name of the community water system in the “Facility” search box, select “Custom Query” under “Document Category/Type,” and select “CCR” as the “Selected Type.”

?LicInd=63666& Procde=1501& org=% 20 (last visited Jan. 6, 2022); *K.T. v. Royal Caribbean Cruises, Ltd.*, 931 F.3d 1041, 1047–48 (11th Cir. 2019) (Carnes, C.J., concurring) (explaining that we may take judicial notice of publicly available agency records”), *cert. denied sub nom. Bramwell v. United States*, 143 S. Ct. 165 (2022) (emphasis added); *Long v. Slaton*, 508 F.3d 576, 578 (11th Cir. 2007) (taking judicial notice of an “**investigative report** from the Alabama Bureau of Investigation”) (emphasis added); *Stratford Holding, LLC v. Fog Cap Retail Invs. LLC*, 516 F. App’x 874, 875 (11th Cir. 2013) (taking judicial notice of “**no-listing letter**” as a public record of the **Georgia Environmental Protection Division**) (emphasis added).

/s/Ed. R. Haden

One of the Attorneys for the Defendant

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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will forward a copy thereof to all attorneys of record.

/s Ed R. Haden
OF COUNSEL